



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT

February 9, 2006

Agenda Item No. 2: Continued Consideration of an Administrative Penalty to Mr. Richard E. Norris, Representative for Bottoms Family Trust, for Failure to Provide a Financial Assurance Instrument in the Amount of \$1,319,476 for its Pacifica Quarry site (CA Mine ID #91-41-0001), City of Pacifica, CA.

INTRODUCTION: The State Mining and Geology Board (SMGB) is the lead agency for the Pacifica Quarry (CA ID #91-41-0001), located in the city of Pacifica, San Mateo County, California. At the SMGB's regularly scheduled business meeting on November 10, 2005, the Bottoms Family Trust (operator) was issued a penalty amount of \$50,000 to become effective at 5:00 P. M. on November 10, 2005. The penalty reflected the period from the date of issuance of this Order Imposing an Administrative Penalty. Any additional penalty amount, and imposition of the \$50,000, was to be deferred to the SMGB's regular business meeting scheduled for January 12, 2006.

REGULATORY ASPECTS: The SMGB is the lead agency for the Pacifica Quarry, which is subject to SMARA. SMARA requires that all surface mine operators maintain a financial assurance adequate to reclaim those lands affected by surface mining activities (Public Resources Code Sections 2770 and 2773.1).

In addition, PRC Section 2770(d) states "*The lead agency's review of reclamation plans submitted pursuant to subdivision (b) or of financial assurances pursuant to subdivision (c) is limited to whether the plan or the financial assurances substantially meet the applicable requirements of Sections 2772, 2773, and 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774, but, in any case, the lead agency shall require that financial assurances for reclamation be sufficient to perform reclamation of lands remaining disturbed.*"

PRC Section 2773.1(f) states, "*On or before March 1, 1993, the board shall adopt guidelines to implement this section. The guidelines are exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part I of Division 3 of Title 2 of the Government Code, and are not subject to review by the Office of Administrative Law.*"



Executive Officer's Report

BACKGROUND: At the SMGB's regularly scheduled business meeting on May 12, 2005, the SMGB approved a financial assurance amount of \$1,319,476 for the Pacifica Quarry (Mine). On May 13, 2005, the SMGB notified the operator of the Board's approval of this amount, and subsequently requested that an acceptable financial assurance instrument in that amount be provided by June 15, 2005.

On June 24, 2005, Richard E. Norris, of the firm Archer-Norris, and representing the Bottoms Family Trust (Operator), requested an extension of the date by which the Operator was to provide the financial assurance mechanism. Mr. Norris outlined a plan for the Bottoms family to meet their financial assurance requirement for this site in their letter dated June 24, 2005. On June 30, 2005, the SMGB office replied that only the SMGB can change a deadline it has set, and the request was received after the SMGB's July meeting agenda had been established. The Bottoms family was encouraged to file the financial assurance as outlined in their letter dated June 24, 2005, and informed that the SMGB would take any good faith and proactive actions into consideration at its September meeting.

On August 19, 2005, the SMGB issued a Notice of Violation (NOV) of the Surface Mining and Reclamation Act (SMARA; Public Resources Code Section 2710 et seq.) for failing to post a Financial Assurance Mechanism for the Pacifica Quarry. Such instrument was to be submitted to the SMGB office within 30 days of receipt of the NOV.

As of the SMGB's regular business meeting held on September 22, 2005, an Order to Comply to provide a financial assurance instrument in the amount of \$1,319,476 was issued to the Operator. On November 4, 2005, the SMGB's office received notice from the operator's agent, Mr. Norris, that the quarry site was sold to Rockaway Beach, Ltd., a Florida limited partnership, and that a condition of the close of escrow was the new owner's obligation to post the financial assurance instrument. Close of escrow occurred on July 29, 2005.

On October 3, 2005, the SMGB's office was notified by the new owner's representative, Mr. James Reuben, with the law firm of Reuben and Junius, LLP, indicating their intent to "*to design and develop a first class mixed-use project that would include hotel, commercial and residential components. In our view, a reclamation could not most efficiently be implemented at the time of the build out of such a project and it is our hope that we would be able to work with you and your staff to modify the Reclamation Plan accordingly.*"

A SMARA site inspection was performed by the Executive Officer on November 15, 2005. Mr. Daniel Grimm, senior Vice President of Peebles Atlantic Development Corporation and representing the new owner, and Ms. Mignone Wood, a consultant and Associate of Malcolm Carpenter Associates, accompanied the Executive Officer. The site was deemed inactive with no significant change evident relative to previous inspections performed in 2003 and 2004.



At the SMGB regular business meeting held on January 12, 2006, the SMGB moved the effective date for posting of an acceptable financial assurance instrument to January 19, 2006. On January 20, 2006, the SMGB office received an Irrevocable Standby Letter of Credit No. S247836 dated January 19, 2006, for the amount of \$1,319,476, with an expiration date of January 17, 2007, at the counters of Northern Trust, Miami, Florida. Two items were apparent in review of the instrument:

1. An acceptable Letter of Credit is a letter from any bank authorized to do business in the State of California granting credit on behalf of the mine operator (Reference: PRC Section 2773.1(a)(1), and SMARA Financial Assurance Guidelines, page 3). No documentation has been provided to demonstrate that Northern Trust is authorized to do business in California; and
2. The mechanism is required to remain in effect for the specified term of coverage plus an additional 120 days, during which time the lead agency can take necessary steps to collect the financial assurance (Reference PRC Sections 2773.1(a)(2), and 2207(a)(9), and SMARA Financial Assurance Guidelines, pages 3 and 4).

EXECUTIVE OFFICER'S ANALYSIS OF ADMINISTRATIVE PENALTY CRITERIA: Pursuant to PRC Section 2774.1(c), the SMGB must take under consideration several criteria when setting the amount of administrative penalty. These criteria are discussed below:

A. Nature & Extent (*Degree and substance of violation*)

1. Is the case one of total failure to provide approved reclamation plans or financial assurances, or to report and pay fees? Is the failure one of intentional delay and obfuscation, or refusal to comply?
2. Is the case one of partial failure to provide approved documentation, or pay partial fees? Is the failure a "clerical error," or a misunderstanding of what was required and when?

Analysis: This is a case of total failure on the part of the Operator to provide an acceptable financial assurance instrument to the Department of Conservation. The conduct of the Operator manifests an intentional disregard for the law.

B. Circumstances (*Outside influences*) What are the circumstances affecting the Operator's failure to comply?



1. Were the circumstances avoidable had the Operator acted on his/her own behalf? How responsible was the Operator in attempting to control, to take charge of, “circumstances” that directly affected his/her business?

- (a) Should the operator have had a more active role in directing hired consultants?
- (b) Should the operator have had a more active role in obtaining responses from government agencies?

2. Were the circumstances particularly unique, or were they encountered by other operators and could have been anticipated?

- (a) How many other surface mines are already in compliance with the lead agency?
- (b) Is it reasonable to assume that the operator should have been aware of circumstances encountered by other compliant operators?

Analysis: The Operator was acting on his own behalf in failing to file, and is the sole responsible party. The mine does not continue to conduct surface mining operations on a daily basis, with no intention to resume such activities, thus, the reclamation should proceed promptly. The issue faced by the Operator is not unlike that faced by every other surface mine operator in the State: the requirement to have an acceptable financial assurance instrument in place, in the amount approved by the lead agency. The Operator has conducted surface mining operations at this site for several years, and has had an approved, albeit inadequate, financial assurance instrument in the past. The Operator is well aware of this responsibility.

C. Gravity (Financial costs or economic losses to others)

1. What financial or economic burden has the lead agency had to bear as a result of the non-compliance of this operator?

- (a) Has the lead agency had to expend excessive funds (personnel time and costs) to try to bring the operator into compliance, thus increasing the amount of fees to be collected from the compliant operators to pay for the local SMARA administration?
- (b) Has the lead agency had to redirect personnel from other tasks, thereby delaying the implementation of those tasks and services, in order to deal with the non-compliant operator?

Analysis: The staffs of the Office of Mine Reclamation and the SMGB have expended time, material resources, and finances, attempting to bring the Mine into compliance with SMARA, specifically by conducting physical site inspections pursuant to PRC Section 2774. Staff and resources have been diverted from other important tasks because of the Operator’s willful disregard for the law, and failure of the Operator to comply with orders issued by the SMGB.



D. Prior Violations (*History of compliance/cooperation*)

1. Has the Operator received Administrative Penalties in the past?
 - (a) For the same violation at the same or a different operation?
 - (b) For a different violation at the same or a different operation?
2. Has the operator been cooperative regarding past violations? Has the operator paid previous penalties and made necessary corrections, or had to be referred to the Attorney General's Office for failure to respond?

Analysis: The Mine came under SMGB jurisdiction with the assumption of lead agency authority from the City of Pacifica in 2002. The Operator has not received administrative penalties in the past.

E. Degree of Culpability (*Personal knowledge and behavior*)

1. Could it be assumed that a reasonable person in this position should have known that documents or fees were due?
2. How long has the Operator known that plans, reports, fees or financial assurances were due prior to the issuance of the penalty?
3. How much notice was given by the Department/Lead Agency?

Analysis: The record clearly demonstrates that the Operator has long known of the necessity to comply with SMARA's requirements, and the necessity to provide an acceptable financial assurance instrument in the amount of \$1,319,476 since May 13, 2005. An acceptable financial assurance instrument was due on June 15, 2005.

F. Economic Savings (*Financial or economic gains to self*)

1. Has the Operator received a financial or economic benefit from avoiding SMARA requirements?
 - (a) Not preparing a reclamation plan (reclamation plan and CEQA).
 - (b) Not posting a financial assurance (actual value or paying premiums).
 - (c) Not securing local permits (permitting fees and inspection costs).
 - (d) Not paying annual reporting fees to Lead Agency and State.



2. What length of time has the Operator enjoyed these economic savings? The extent of any economic savings realized by the Operator may depend on the length of time the appellant has been out of compliance.

Analysis: The SMGB at its regular business meeting held on May 12, 2005, approved a financial assurance amount for this site, to be provided by June 15, 2005. The Operator has enjoyed an economic and financial benefit from not being in compliance with the annual reporting requirements since such date. The Operator's overhead costs and capital outlay have thus been reduced.

G. Any Other Matters Justice May Require -- This criterion is necessary to ensure that "the quality of justice/mercy is not strained" in either direction.

SMARA has been in effect since 1976 and the requirements of AB 3551 (i.e., PRC Section 2207) have been in effect since 1990. Ignorance of the existence of these laws and their requirements may not make a reasonable argument.

1. Has the non-compliant mining operation caused, or has the potential to cause, serious property damage to neighboring lands, roads, or other community facilities; or caused, or has the potential to cause, irreparable damage to the environment, if left to operate as is; or threatened, or has the potential to threaten, the safety or health of humans?
2. How truthful is the operator in his/her request? Does the argument seem reasonable and logical and supported by documented facts, or is the trying to obfuscate facts or events?
3. What is the culpability of the lead agency in allowing the continuance of a non-complying Operator? Although the Operator ultimately must bear full responsibility for his/her operation and its effects, what steps did the lead agency take to encourage or discourage compliance?
4. Has the Operator truly made "good-faith" efforts to comply, or continually missed deadlines for compliance? Has the Operator repeatedly ignored direct warnings from the lead agency or from the Department?
5. Have unforeseen and unavoidable personal circumstances delayed or prohibited the Operator from complying fully?

Analysis: Based on the evidence, the Executive Officer believes with respect to the criteria cited above:



(1) The noncompliance of the Mine with its financial assurance requirement has the potential to bring long term harm to the mine site and the natural environment, and to create a safety hazard to humans, in that there will be no funds available to the lead agency to reclaim the site if the Operator becomes incapable of completing reclamation. The amount and cost of reclamation work increases with time.

(2) The Operator previously has informed the SMGB office that: (a) financial assurance funds would be forthcoming; (b) Mr. Bottoms passed away; (c) a change in land ownership would delay providing the financial assurance instrument; and, (d) new ownership assumed that more time would be available before the financial assurance instrument would be due. Although there may be some truth in reasons (a) through (d), this series of excuses has only further delayed the posting of a financial assurance instrument for the site.

(3) SMARA requires an operation to post a financial assurance until the site is reclaimed. The Operator has missed several opportunities to post a financial assurance instrument, but did not provide such instrument as required anytime between May 13, 2005, and November 1, 2005 (six months).

(4) The Operator has not made good faith efforts to comply with SMARA or PRC Section 2207 as is clearly indicated in the record. The Operator has made efforts to contact the SMGB to explain why the annual report and mine fees were not submitted, however, such explanations did not excuse the Operator from adhering to the due dates set forth by the SMGB.

(5) Mr. Bottoms passed away, which delayed the posting of a financial assurance instrument, and the property is under new ownership who has accepted the responsibility for reclamation, and in the process of acquiring an acceptable financial assurance instrument.

EXECUTIVE OFFICER'S RECOMMENDATION: The operator has failed to provide a revised and adequate financial assurance instrument as required by SMARA and as requested by the SMGB on numerous occasions, and to respond to the SMGB's Order to Comply issued on September 22, 2005. The Executive Officer has previously recommended that the following administrative penalty be approved by the SMGB. According to PRC Section 2774.1(c), an order setting an administrative penalty becomes effective upon issuance, and the penalty amount is assessed from the original date of non-compliance with SMARA or Public Resources Code Section 2207. As authorized by statute, the maximum amount per violation is \$5,000 per



day. The Executive Officer submits that the date of non-compliance is August 19, 2005, which is the date on which the Operator received the SMGB's Notice of Violation.

Violation: Failure to provide an adequate financial assurance instrument as required by Public Resources Code Section 2773.1.

Administrative Penalty Amount of \$50,000 becomes effective at 5:00 P. M. on February 9, 2006. The penalty is to be paid to the SMGB office within 30 calendar days from the date of issuance of the Administrative Penalty. This amount represents a fine of \$5,000 per day for ten of the 68 days of noticed violation between August 19, 2005 (receipt of Notice of Violation), and the effective date of the SMGB's Order to Comply (September 22, 2005).

The financial assurance instrument dated January 19, 2006, and provided to the SMGB on January 20, 2006, substantially meets the applicable requirements of Sections 2772, 2773, and 2773.1, and the lead agency surface mining ordinance adopted pursuant to subdivision (a) of Section 2774. However, two items were noted that prevents the SMGB from approving the instrument at this time.

First, a Letter of Credit pursuant to PRC Section 2773.1(a)(1) is defined in the SMGB SMARA Financial Assurance Guidelines (page 3) as "*a letter from any bank authorized to do business in the State of California granting credit on behalf of the mine operator*". Documentation dated February 1, 2006, provided by the new owner's representative, Mr. James Reuben, attorney with Reuben & Junius, LLP, does not clearly demonstrate that Northern Trust is authorized to do business in California, nor is the financial institution that issued the financial assurance instrument registered with the Secretary of State of California. Thus, the financial assurance substantially meets the applicable requirements of Sections 2772, 2773, and 2773.1, it is not consistent with the SMGB guidelines, and is thus not an acceptable mechanism.

Secondly, SMARA Financial Assurance Guidelines (pages 3 and 4), states "*the mechanism is required to remain in effect for the specified term of coverage plus an additional 120 days, during which time the lead agency can take necessary steps to collect the financial assurance.*" Page 2 of 2 of the financial assurance instrument provided by Northern Trust states "*It is a condition of this letter of credit that it shall be deemed automatically extended without amendment for one (1) year from the expiration date hereof, or any future expiration date, unless sixty (60) days prior to any expiration date we shall notify you by courier to your address set forth above that we elect not to consider this letter of credit renewed for any such additional period.*" Thus, although the



financial assurance substantially meets the applicable requirements of Sections 2772, 2773, and 2773.1, it is not consistent with the SMGB guidelines.

In summary, the Executive Officer finds that the financial assurance instrument provided by the new owner substantially meets the applicable requirements of Sections 2772, 2773, and 2773.1, but certain criteria set forth in the SMGB SMARA Financial Assurance Guidelines were not met. The guidelines do have regulatory authority pursuant to PRC Section 2773.1(f), and thus require compliance.

The Executive Officer thus recommends that the SMGB defer implementation of the administrative penalty to the operator, and request that the new owner provide within 30 days either 1) documentation that the financial institution, Northern Trust, has the authority to perform business in the State of California, or 2) a subsequent mechanism to the SMGB for approval consideration.

SUGGESTED MOTION LANGUAGE:

Motion to accept the Executive Officer's recommendations and defer the Administrative Penalty as set forth:

Mr. Chairman, I move that the Board approve of the analysis, findings, and recommendations contained in the Executive Officer's Report and that the Board, acting as lead agency with authority provided under PRC Section 2774.1, defer the implementation of the Administrative Penalty to the operator in the amount and conditions recommended in the Executive Officer's Report, and request that the new owner provide within 30 days either documentation that the financial institution providing the financial assurance instrument has the authority to perform business in the State of California, or a subsequent mechanism to the SMGB for approval consideration.

